"It is possible that the perfect and most expert driver might have done a little better. The standard, however, is not that of the perfect driver, but the driver using ordinary care and skill."

With respect, it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists.

Turning to the instant case the fault of the taxi-driver was said to lie in his failure to reduce speed and keep a proper lookout. To be found wanting in these respects, however, I think there should have been a finding of fact not only as to the speed at which he was going but also the interval of time and space affording him opportunity to avoid the consequences of the other driver's recklessness after he should reasonably have anticipated danger. How far did visibility extend when the taxi reached the brow of the hill and both drivers were in sight of each other? How far apart were the two vehicles when the Penghulu gave unmistakable indication, if any, of his intention to cross the path of the taxi? To these questions I have been looking for an answer. It seems to me, therefore, that without these essential primary findings of fact the inference of any want of care cannot be legitimately drawn.

The learned trial judge had disbelieved the Penghulu when he said he stopped before attempting to cross. Assuming, then, that he was going at no more than 10 m.p.h. when about to make the right turn, the fact (a) that he was barely half-way over the centre line of a 20-foot road at the point of collision and (b) that, not the broadside, but the offside front of the car was hit by the offside front of the taxi in an almost frontal collision, seems to me clear and indisputable evidence that the car could only have started to cross over when the taxi was so close that no evasive action was possible, even had the taxi itself been going at the most moderate speed. So much as to the facts.

On the question of law it seems to me that the *dicta* of Lord Uthwatt in *London Passenger Transport Board* v. *Upson* [3] should be read as applying only where the surrounding circumstances plainly justify their application. As his Lordship said:—

"A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

In that case the accident had occurred at a busy pedestrian crossing in Baker Street and it was common experience, admitted by the bus driver himself, that in London pedestrians habitually stepped off pavements without looking to see that they could do so in safety. Even so, the driver is entitled to be exonerated in certain circumstances, as was Shaw when Brophy darted out in a "negligent and irresponsible manner."

The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motor cars and motor-cycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down.

I would allow this appeal in respect of the 2nd appellant's liability for contributory negligence; the judgment of the learned trial judge is affirmed as to the finding of negligence against the 3rd respondent, who consequently is wholly liable.

The appellants will have their costs here and in the court below, in the form of the *Bullock order*.

Suffian and **MacIntyre F.JJ.** concurred.

Appeal allowed in respect of the 2nd appellant's liability; 3rd appellant's appeal dismissed.

Solicitors: *Murphy & Dunbar; Khoo & Sidhu.*

PUBLIC PROSECUTOR v. ABDUL HAMID

[A.Cr.J. (Syed Othman J.) October 30, 1968]
[Kuala Trengganu — Criminal Appeal No. 10 of 1967]

Criminal Law and Procedure — Power of court to summon and examine person to give evidence — Power to be exercised only for strong and valid reason — Criminal Procedure Code (Cap. 6), s. 425.

In this case it appeared that the learned magistrate at the trial called on the accused to enter upon his defence on a charge of voluntarily causing hurt with a parang, and the accused thereupon made his defence and alleged that the case against him was a frame-up. The learned magistrate then adjourned the case to call two witnesses, the *ketua kampong* and a police officer. Subsequently the learned magistrate found that on the evidence of the accused and the evidence of the court witnesses, the accused had shown a reasonable doubt in the case for the prosecution and he acquitted the accused. He did not however indicate what was the part of the evidence of accused or any of the court witnesses which created the reasonable doubt in his mind as to the case for the prosecution. The public prosecutor appealed.

Held: (1) the power given by section 425 of the Criminal Procedure Code to the court to summon and examine any person to give evidence must be exercised with the utmost caution and only when as set out in

the provisions the evidence of that person appears to the court essential to the just decision of the case;

(2) in a criminal trial the court should not call any witness at the close of the case of any party unless there is strong and valid reason and in this case no such reason existed;

(3) the evidence could not in any case have been said to have created any doubt as to the prosecution case and therefore the acquittal by the learned magistrate was clearly against the weight of the evidence.

MAGISTRATE'S CRIMINAL APPEAL.

Abu Talib bin Othman (Deputy Public Prosecutor) for the appellant.

Dato' Bijaya for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The respondent in this appeal was charged for voluntarily causing hurt with a parang, an offence punishable under section 324 of the Penal Code. At the conclusion of the trial he was acquitted. The public prosecutor is appealing against the acquittal.

The case for the prosecution in the trial was as follows: On the day in question the complainant and two friends were carrying durians. They stopped on the way as one of the friends went to wash his legs. Accused came to the spot with a boy. He struck the complainant with a parang. The injuries sustained by the complainant according to the evidence of the doctor were a laceration and an abrasion on the right elbow. As he was striking a second time a friend of the complainant pulled the accused away. The other friend then snatched the parang away from the accused. Complainant ran away from the spot and went to the Tepoh Police Station and lodged a report. After complainant had run away, the parang was returned to accused. According to the complainant he believed that accused was angry with him because about three months before the incident he had reported to the police when he found accused's eight buffaloes grazing on his vegetable plants.

On the above evidence adduced by the prosecution the learned magistrate rightly called upon the accused to enter into his defence.

The accused's story was that the case against him was a frame-up. In cross-examination he said that the person who had snatched the parang away from him and who gave evidence for the prosecution had a grudge against him as that person owed him $8.80. On a question by the court the accused said that he knew the *ketua kampong* of his place. The learned magistrate then ordered the *ketua kampong* to give evidence. The trial was postponed for the purpose. The evidence of the *ketua kampong* supported the story that complainant's plants had been damaged by buffaloes but they belonged to accused's sister-in-law. According to him the accused had no buffaloes. There was then a settlement. The learned magistrate then called a police constable attached to Tepoh Police Station. He gave evidence that the complainant had informed him that he had caught some buffaloes which were near the house and asked the constable what was to be done with them. The constable told him he could go to the police station and lodge a report. No report appeared to have been lodged.

On the evidence of the accused and the evidence of the court witnesses the learned magistrate found that the accused had thrown a reasonable doubt in the case for the prosecution and acquitted him but he does not indicate what was the part of the evidence as adduced by the accused or any of the court witnesses which created the reasonable doubt in his mind as to the case for the prosecution.

No doubt section 425 of the Criminal Procedure Code gives a wide power to the court to summon and examine any person to give evidence but this power, as has been reiterated by many authorities which I need not cite here, must be exercised with the utmost caution and only when as set out in the provisions the evidence of that person appears to the court essential to the just decision of the case. In a criminal trial at the close of a case of any party the court should not call any witness unless there is strong and valid reason. In this case I cannot see any such reason existed. There was nothing in the evidence of the accused person which suggested to the court that it would be in the interest of justice that the two witnesses should be called. Their evidence as far as I can see supported the complainant's story as to the reason for the incident and cannot in any way be said to have created any doubt as to the prosecution's case. The acquittal by the learned magistrate was clearly against the weight of evidence.

I therefore set aside the order of acquittal of the learned magistrate and substitute therefor an order of a finding of guilty against the accused person. In view of his age, which is 70 now, and the fact that he has no previous conviction, I order him to be bound over under section 173A(ii)(h) of the Criminal Procedure Code in the sum of $100 with one surety for a period of six months.

Order of acquittal set aside.

Finding of guilty substituted.

Solicitors: *Dato' Bijaya & Co.*